HONG KONG & SHANGHAI BANKING CORP. LTD.

v.

WAN MOHD WAN NGAH

HIGH COURT MALAYA, KUANTAN
LAMIN MOHD. YUNUS J
[SUIT NO. 23-65-86]
8 JANUARY 1991

LAND LAW: *Charge - Only form of security - Default - Whether chargee can pursue both foreclosure proceedings and civil action concurrently - Interpretation of terms in annexure to charge - Two separate remedies.*

CIVIL PROCEDURE: *Land charged as security - Default - Whether chargee can pursue both foreclosure and civil action concurrently - Interpretation of charge document - Competent tribunal - Abuse of process.*

The plaintiff bank HSBC had given housing loan facilities to the defendant W and as security, W had charged his house and land to HSBC. To realise outstanding monies, HSBC applied for an order of sale for the charged land and this was granted by the Kuantan Land Office but a date for auction was not yet fixed. HSBC then filed a writ of summons in Court claiming the amount due.

The question for the Court was whether the plaintiff chargee is entitled in law and in equity to proceed by way of a civil suit before first realising the security under the charge (foreclosure proceedings) and if so whether the plaintiff is entitled to proceed concurrently on all his remedies.

Held:

[1] (a) Upon reading the annexure to the charge especially Clauses 8, 36, 37 and 40 it is clear that the chargee and chargor are bound by the terms and conditions of the chargee; the chargee must exercise his rights and powers as provided in the annexure and to realise the amount owing, the annexure states that the land must be sold in accordance with the provisions of the National Land Code (NLC);

(b) If the amount realised from the sale is not sufficient to cover the amount due then it is implied that a separate action may be taken against the debtor/chargor to recover the balance should he fail to pay the chargee the difference.

[2] In the cases where the loan was secured by two collateral securities namely a charge and a guarantee, our Courts generally have taken the view that it is not required to realise the security under the charge before enforcing the guarantee. However it appears that this view has been adopted because they have been influenced by the provisions of the guarantee; in this case, there was no guarantee.

[3] (a) The foreclosure proceedings were before the land administrator as it was a land office title that was the subject matter of the proceedings (s. 260 NLC).

(b) Under the NLC if the subject matter of the foreclosure is a registry title, then the High Court will be the tribunal that will dispose of the application for the foreclosure action (s. 256 NLC);

(c) In this case, the land administrator is a competent tribunal under the law where the plaintiff bank can obtain a complete remedy; to allow the plaintiff to file an action before another tribunal, in this case, the High Court, where the earlier proceedings have not even been completed before the land administrator, must be treated as a case of an abuse of the process of the Court;

(d) the foreclosure action is complete upon the sale of the land and should there be a short-fall after recovery of the amount due from the sale price, Clause 8 is immediately attracted in that the chargor "shall" make good the difference.

[Plaintiff's action stayed.]

Cases referred to:
Malaysian International Merchant Bankers v. G & C Securities Sdn. Bhd. [1988] 1 CLJ (Rep) 793
Bank Bumiputra Malaysia Berhad v. Doric Development Sdn. Bhd. & Ors [1988] 1 CLJ (Rep) 361
Bank Bumiputra (M) Berhad v. Esah bt Abdul Ghani [1985] CLJ (Rep) 41
Ewart v. Latta [1865] 4 Macq 983
Ng Yik Seng & Anor. v. Perwira Habib Bank Malaysia Berhad [1980] 2 MLJ 83
Malaysia Building Society Berhad v. Lim Kheng Kim & Ors. [1988] 1 CLJ (Rep) 770
Williams v. Hunt [1905] 1 KB 512
Lesco Development Corp. Sdn. Bhd. v. Malaysia Building Society Berhad [1987] CLJ (Rep) 160

Legislation referred to:
National Land Code 1965, ss. 256

For the plaintiff - Jaya Ramachandran; M/s. Balendran Chong Haranay & Bodi
For the defendant - Mura Raju; M/s. Mura Raju & Co.

JUDGMENT

Lamin Mohd. Yunus J:

This is an application by the plaintiff bank for the decision of this Court on the following questions:

> Whether the plaintiff being also the chargee of property comprised under HS (M) 13399 Lot 3134/29 in the mukim of Kuala Kuantan is entitled at law and in equity to proceed by way of a civil suit before first realising the security under the charge and if so, is the plaintiff entitled to proceed concurrently on all his remedies?

The plaintiff bank has made available banking facilities to the defendant by way of an advance as a housing loan and, for security, the same land where the purchased house stands is charged in favour of the plaintiff. That is the only form of security for the facilities given. Now the outstanding amount due as at 9 May 1986 to the plaintiff on the said facilities for which a claim is being made is RM290,873.56. (The description of the landed security is as appears in the question posed above.) To realise the money owing, the plaintiff has applied for an order for sale of the charged land and the Kuantan Land Office has granted the application but has yet to fix the date of auction. The plaintiff has also filed a writ of summons in this Court claiming the amount now due.

The undisputed facts are that the charge is the only form of security for the loan. The defendant is the borrower and is also the registered owner of the charged land. The loan was granted in October 1982. The charge was registered on 22 February 1983. The amount of loan outstanding is not in issue.

Learned Counsel for the plaintiff maintains that the question as posed to this Court must be answered in the affirmative in that both the foreclosure proceedings and the civil action can concurrently be pursued and Counsels for both parties cited a number of authorities.

In the case of the *Malaysian International Merchant Bankers v. G & C Securities Sdn. Bhd.* [1988] 1 CLJ (Rep) 793, on 14 December 1982 the plaintiff bank gave a loan to the 1st defendant company for a housing project and the company executed a charge in favour of the plaintiff bank. The same day the director of the company executed a written guarantee for the repayment on demand of all sums owing. When the defendants could not pay the loan a demand was made but they failed to pay. A writ of summons was first filed claiming for the sum of RM335,958.52 by way of balance of principal and interest thereon. Then a foreclosure action was taken. The learned Senior Assistant Registrar gave summary judgment and rejected the argument on behalf of the defendant that the charge should be realised first before the suit could be proceeded with. The appeal against the Senior Assistant Registrar's decision was dismissed.

In the case of *Malaysia Building Society Berhad v. Lim Kheng Kim & Ors.* [1988] 1 CLJ (Rep) 770 the plaintiff gave a loan to an incorporated company. The said loan was secured by a charge over the company's land. At the same time, the defendants also stood as guarantors for the loan. It was contended on behalf of the defendants that as the plaintiff had obtained an order for sale of the borrower's land and the sale was pending, the suit was therefore a useless piece of litigation because the value of the property exceeded the judgment sum. The Court held that the provisions of the guarantee as a whole were such that the plaintiff was not bound or required to realise the security before enforcing the guarantee.

In the case of *Bank Bumiputra Malaysia Berhad v. Doric Development Sdn. Berhad & 2 Ors.* [1988] 1 CLJ (Rep) 361 the plaintiff granted an overdraft facility to the 1st defendant company secured by a charge over the company's land. In addition, the 3rd defendant signed a letter of guarantee for the repayment of the overdraft. The learned Registrar granted leave to enter final judgment against them in favour of the plaintiff. The 1st and the 3rd defendants appealed against the said decision but it was dismissed.

In the case of *Bank Bumiputra (M) Berhad v. Esah bt. Abdul Ghani* [1985] CLJ (Rep) 41, the plaintiff bank lent money to the principal debtor in the sum of RM16,000 and for security, two pieces of land belonging to the principal debtor and two others were charged. The respondent stood as a guarantor for the said loan. When the loan could not be repaid, the plaintiff first took a foreclosure action on the land but before the issuance of the order of sale, one of the owners died. So foreclosure was not proceeded with. Instead the plaintiff bank took out a writ against the principal debtor and the surety (i.e., the respondent). Judgment was entered against both of them. Based on the said judgment, a bankruptcy notice was issued calling on the surety to settle the amount. The surety failed to pay and a creditor's petition was filed against her. She then filed a notice of intention to oppose the creditor's petition. The learned Judge stayed the petition pending the decision of the petition against the principal debtor. The plaintiff bank appealed and the Supreme Court held that the learned Judge had no jurisdiction either to dismiss or stay the creditor's petition.

In the case of *Ng Yik Seng & Anor. v. Perwira Habib Bank Malaysia Berhad* [1980] 2 MLJ 83, the respondent bank granted an overdraft to a company secured by a legal charge and a guarantee by four guarantors in their personal capacities (the two appellants and two other directors). However in this case, only the guarantors were sued for the repayment of the

overdraft. So the question as to whether the charge must first be realised in order to satisfy the money owing was not put squarely before the learned Senior Assistant Registrar perhaps because either no action was taken under the charge or that the guarantors (the appellants) only relied on one ground in their defence in that they denied executing the guarantee for the reason that the signatures thereon were not theirs. So the real question before the Federal Court in this case was whether there was a triable issue and it decided in the affirmative.

In the case before me the only security is the legal charge and the defendant is the borrower and the chargor as well. In all the above cases, the loans or the banking facilities were secured by a charge and a written guarantee or guarantees. The guarantee is just another security independent of the charge carrying with in its own terms and conditions to bind the guarantor and failure to comply with any of them will constitute a breach which will form the basis for the issuance of a writ. It has been said that a guarantee is a mere collateral security and so is a charge. So in a case like the instant case where there is only one form of security for the loan which is the charge, it can be argued that the plaintiff is at liberty to proceed direct against the defendant who is the borrower and the debtor for the recovery of the sum due and owing. Legally can the plaintiff do that in the face of the terms and conditions of the charge as found in the annexure? For ease of discussion, I repeat below some of the relevant clauses of the annexure.

Clause 8:

> If the amount realised by the chargee on a sale of the said land under the provisions of the National Land Code after deduction and payment from the proceeds of such sale of all fees due costs rents rates taxes and other outgoings on the said land is less than the amount due to the chargee and whether at such sale the chargee is the purchaser or otherwise the chargor(s) shall pay to the charge the difference between the amount due and the amount so realised and until payment will also pay interest on such balance at the prescribed rate as aforesaid with monthly rests.

Clause 36:

> The security liabilities and or obligations created by this charge shall continue to be valid and binding for all purposes whatsoever notwithstanding any change by amalgamation reconstruction or otherwise which may be made in the constitution of the chargee or of any company by which the business of the chargee may for the time being be carried on and shall be available to the company carrying on that business for the time being.

Clause 37:

> The security liabilities and or obligations created by this charge shall continue to be valid and binding for all purposes whatsoever notwithstanding any change whether by reason of amalgamation bankruptcy death incorporation liquidation reconstruction winding up or otherwise howsoever in the name style constitution or composition of the chargor(s) and the expression the "chargor(s)" in this charge includes the persons for the time being deriving title under the chargor(s) and it is expressly declared that no change of any sort whatsoever in relating to or affecting the chargor(s) shall in any way affect the security liabilities and or obligations created by this charge in relation to any transaction whatsoever whether past present or future.

Clause 40:

> This charge shall be binding upon the heirs liquidators receivers representatives assigns and successors in title of the chargor(s) and on the successors in title and assigns of the chargee.

Clauses 36 and 37 stipulate that the security liabilities and or obligations created **by the charge shall** continue to be **valid and binding** for all purposes notwithstanding any change in the position, status and constitution of the charge and chargor. By Clause 40 the charge binds both the chargor and his successors in title and assigns including the heirs, liquidators, receivers and representatives. If the chargor shall make default in respect of any of the provisions in Clause 6 then in any of such case the loan etc., for the time being **under the charge** shall immediately become payable and the chargee shall forthwith be entitled to recover the same "and to exercise the rights and powers upon default **herein this charge".** If the amount realised by the chargee on the sale of the charged land is less than the amount due to the chargee, the chargor shall pay to the chargee the difference between the amount due and the amount so realised. So the personal liability of the chargor is only to the extent of the balance of the amount due (Clause 8). It is quite clear that upon reading the annexure as a whole both the chargee and the chargor are bound by the terms and conditions of the charge and to realise the amount owing, the land must be sold in accordance with the provisions of the National Land Code. If the amount realised from the sale is not sufficient to cover the amount due then it is implied that a separate action may be taken against the debtor/chargor to recover the balance should he fail to pay the chargee the difference.

In the cases cited above where the loan was secured by two collateral securities namely a charge and a guarantee, our Courts generally have taken the view that it is not required to realise the security under the charge before enforcing the guarantee. However it appears that their view has been adopted because they have been influenced by the provisions of the guarantee. In *Malaysian International Merchant Bankers Bhd. v. G & C Securities Sdn. Berhad & Anor.* [1988] 1 CLJ (Rep) 793 Shankar J has this to say (p. 794):

> So far as the 2nd defendant was concerned Clause 3 of the guarantee provided that all monies due from the company could nevertheless be recoverable from him as principal debtor, and Clause 4 provided that the guarantee was in addition to and not in substitution for any other rights which the bank may have had under the charge. Clearly therefore it was open to the bank to proceed simultaneously against the 2nd defendant as well.

In *Malaysia Building Society v. Lim Kheng Kim & Ors.* [1988] 1 CLJ (Rep) 770, we find Clause 5 of the guarantee carrying somewhat similar intent as Clause 4 in *Malaysia International Merchant Bankers'* case. Edgar Joseph Jr. J in the *Malaysia Building Society's* case found further support in Clause 3 of the guarantee and he had this to say (p. 782):

> As if to put the matter beyond doubt, the last sentence of Clause 5 provides that 'the society shall not be bound or required to proceed against the security first before enforcing this guarantee against the guarantors.

(Note: In the CLJ report at p. 782, it is stated as "Clause 5". Rightly it should read as "Clause 3".)

In the case of *Asia Commercial Finance Berhad v. Sri Rendangan Sdn. Bhd., Wah Kheng Development Sdn. Bhd., Ng Aik Kheng, Tan Kok Bau* (Penang High Court Civil Suit No. 23-505-86) (unreported), though the loan was secured by a charge and a guarantee, the Court decided that the claim against the 1st defendant (the registered proprietor of the land and the chargor) was premature in view of the reading of Clause 7 of the annexure to the charge. (Note: Clause 7 is in *pari materia* with Clause 8 in the case before me.) The agreement was that the personal liability of the chargor was in respect of the difference and that difference being the balance to be paid by the chargor could only be ascertained after the land has been sold. The 2nd defendant in this case was the borrower while the 3rd and the 4th defendants were guarantors. The plaintiffs had already applied for an order of sale of the

said land. But in the civil action, the 1st defendant (owner of the land) applied for the action against them be struck out on the ground that the action was premature because the land had not been sold. There was no discussion on the provisions of the guarantee unfortunately.

In another unreported case but before the Kota Bharu High Court in the case of *Public Bank Berhad v. Mohd. Hassan b. Abu Bakar* (Civil Suit No. 24-145-1986) (unreported), where the defendant obtained a housing loan from the plaintiff bank secured by a charge on the defendant's land and upon default in payment, the plaintiff filed a suit. After the defence had been filed, the plaintiff filed a summons-in-chambers for an order that the statement of defence be struck out as it disclosed no reasonable defence and was vexatious and an abuse of the process of the Court and that the plaintiff be at liberty to enter final judgment. About a month afterwards, the defendant filed a summons-in-chambers for an order that the action and all pending applications be stayed on the ground that he had been ordered by the Collector of Land Revenue, Kota Bharu to pay the amount due and owing failing which the property would be sold. In view of this, the defendant said that the plaintiff could always proceed against him in Court for the balance in the event that the proceeds of the sale was insufficient to cover the loan and the interest. The Court dismissed the defendant's application for a stay of the proceedings as the learned Judge was of the view that the plaintiff had the discretion to sue in any manner for the sum due. A number of authorities were cited before him and he appeared to have placed reliance in particular on *Bank Bumiputra Malaysia v. Esah* (ante) and *Ewart v. Latta* [1865] 4 Macq 983. In this unreported case no reference was made to the terms and conditions of the charge as normally found in the annexure so that we are deprived of the learned Judge's view on them.

Even Clause 8 of the annexure to the charge in the present case cannot override the provisions of a guarantee if there were any in the case before me similar to those found in the two cases cited above namely the *Malaysia Building Society* and the *Malaysian International Merchant Bankers.* I entirely agree with the learned Judge in the *Malaysian International Merchant Bankers'* case on the effect of s. 11.03 of the charge (s. 11.03 is similarly worded as Clause 8 of the annexure in the present case.) But there is no written guarantee involved in the case before me. The only form of agreement or covenant agreed to by both the plaintiff (the chargee) and the defendant (the chargor) is the annexure to the charge which carries the terms and conditions of the charge. In the event the chargor makes default, the loan for the time being owing "shall immediately become payable" and the chargee "shall forthwith become entitled to recover the same" and "to exercise the rights and powers upon default herein **this charge"** (Clause 6). The real intent of this provision appears to be that when the loan becomes payable, of course the plaintiff will immediately become entitled to recover and when he decides to proceed for recovery he must exercise his rights and powers as provided in the annexure to the charge. I am unable to read into it otherwise and all the more so with the operation of Clauses 36, 37 and 40. The annexure must be given effect to.

I am further fortified by the proposition enunciated in the case of *Williams v. Hunt* [1905] 1 KB 512 and in the words of Collins MR (at 574):

> Where two separate remedies are possible, and a start is made by putting in force one of those remedies by a writ which would entitle the plaintiff to the relief he subsequently desires, he cannot by deliberately leaving that out of his claim reserve his right to ask for it in another proceeding. Where proceedings have been started, it is an abuse of the process of the Court to divide the remedy where there is complete remedy in the Court in which the suit was first started.

In that case the facts were that the defendant was a lessee of certain premises which he mortgaged by deed by 28 March 1901, to the plaintiff as security for a loan of 400 pounds. The mortgaged deed contained a provision for the repayment of the principal by quarterly instalments. In May 1924 an action was commenced by writ issued in the Chancery Division by the plaintiff as mortgagee. Before the case was heard, the plaintiff issued a specially indorsed writ in the King's Bench Division by which she claimed 416 *l* 17s 2p for principal and interest. Then the defendant applied for a stay of the proceedings in the King's Bench Division on the ground that the whole cause of action was the subject of the action pending in the Chancery Division. So it was decided that it was an abuse of the process of the Court to allow the proceeding before the King's Bench Division when a complete remedy could be obtained in the Chancery Division. Certainly this was good policy as this could help to discourage litigants from knocking at the door of every Court when the process in the first Court had not completed. In the case before me, the foreclosure proceedings were before the land administrator as it was a land office title that was the subject matter of the proceedings (s. 260 NLC). Under the National Land Code if the subject matter of the foreclosure is a registry title, then the High Court will be the tribunal that will dispose of the application for the foreclosure action (s. 256 NLC). In our case, the land administrator is a competent tribunal under the law where the plaintiff bank can obtain a complete remedy, and to allow the plaintiff to file an action before another tribunal, in this case, the High Court, where the earlier proceedings have not even been completed before the land administrator, must, to my mind, be also treated as a case of an abuse of the process of the Court. The foreclosure action is complete upon the sale of the land and should there be a short-fall after recovery of the amount due from the sale price, Clause 8 is immediately attracted in that the chargor "shall" make good the difference. Whether the chargor in that event will or will not comply is not in issue for the determination of what is a "complete remedy". Just as in *Williams v. Hunt*, compliance with the personal order for payment what was found due was not the concern of the Court.

The case of *Lesco Development Corp. Sdn. Bhd. v. Malaysia Building Society Berhad* [1987] CLJ (Rep) 160 was also cited before me. Unlike in the instant case, two forms of collateral securities were involved in the *Lesco's* case namely by a guarantee and a charge but each was being dealt with in a different division of the High Court Kuala Lumpur. The suit questioning the guarantee was filed first in the commercial division. Four days later while an application to set aside the default judgment was still pending in the first Court a foreclosure action was filed in the family and property division. (It was a registry title). Anyway on appeal the Supreme Court decided that the foreclosure proceedings should have been postponed until final disposal of the suit because there was already a default judgment against the appellant earlier in the civil action and that it was 'undesirable' to allow a situation where two different Courts would try and determine the same issues. With respect I think '*Lesco*' strictly has no application in the case before me.

In the circumstances, my answer to the question posed before me is in the negative and accordingly I order that the present suit be stayed and that cost be in the cause.

Also found at [1991] 1 CLJ 821